PENANG SHIPBUILDING CORP. SDN. BHD.

v.

MASHAHA HOLDINGS SDN. BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[SUIT NO. 23-2-1986]
8 SEPTEMBER 1986

CIVIL PROCEDURE: *Application to strike out defence and counterclaim under O. 18 r. 19 of Rules of the High Court 1980 - Prayer for final judgment on amount in statement of claim with interest and that the counterclaim be struck out with costs - Counterclaim for breach of contract - Issue - Whether defendant has set up a plausible counterclaim - Defence and counterclaim - Whether frivolous, vexatious and an abuse of the process of the Court.*

This was an application by the plaintiff to strike out the defendant's defence and counterclaim under O. 18 r. 19 of the Rules of the High Court 1980 as they disclose no reasonable defence and that they are frivolous, vexatious and an abuse of the process of the Court. Consequently, the plaintiff prayed for final judgment on the amount in the statement of claim with interest and that the counterclaim be struck out with costs.

The plaintiff instituted these proceedings against the defendant for the sum of RM251,002.60 being the balance of the principal amount due and payable by the defendant to the plaintiff for services rendered, labour charges, materials and parts supplied by the plaintiff to the defendant at the request of the defendant.

In addition to the defence, the defendant counterclaimed against the plaintiff for breach of contract pursuant to an oral agreement to carry out repair work and to supply materials for the defendant's tug and barge. The defendant counterclaimed for RM117,000 and asked for unspecified general damages.

Held:

[1] Upon considering the pleadings and the defence as a whole, the learned Judge was satisfied that the defendant had failed to show or raised a reasonable or *bona fide* defence. Accordingly, the plaintiff's application to strike out the defence as it disclosed no reasonable defence and was frivolous and vexatious was allowed and final judgment was entered as prayed in para. 7 of the statement of claim.

[2] The issue here was whether or not the defendant had set up a plausible counterclaim arising out of the same subject-matter of the plaintiff's action. After considering the counterclaim, the learned Judge was of the view that the defendant had set up what is called a plausible counterclaim which is connected with the plaintiff's claim.

[3] The plaintiff is entitled to judgment for the sum of RM251,002.60 with interest and costs. However, the amount counter claimed, which is RM117,000, is less than the plaintiff's claim. In the circumstances, the plaintiff is entitled to judgment for the difference i.e., RM134,002.60 with interest and the execution of the balance of the judgment sum be stayed until the trial of the counterclaim.

[Plaintiff entitled to judgment for difference of RM134,002.60.]

Cases referred to:
A.G. of Duchy Lancaster v. L.N. & Ry. Company [1892] 3 Ch 274
Wenlock v. Moloney [1965] 1 WLR 1238
Anglo-Italian Bank v. Wells and Davies [1878] 38 LT 197
Sheppards and Co. v. Wilkinson and Jarvis [1889] 6 TLR 13

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Balwant Singh Purba; M/s. Balwant Singh & Co.
For the defendant - Ramdas Tikamdas; M/s. Siva, Ram & Associates

JUDGMENT

Mohamed Dzaiddin J:

This is an application by the plaintiff to strike out the defendant's defence and counterclaim under O. 18 r. 19 of the Rules of the High Court as they disclose no reasonable defence and that they are frivolous, vexatious and an abuse of the process of the Court. Consequently, the plaintiff prays for final judgment on the amount in the statement of claim with interest and the counterclaim be struck out with costs.

The plaintiff instituted these proceedings against the defendant for the sum of RM251,002.60 being the balance of the principal amount due and payable by the defendant to the plaintiff for services rendered, labour charges, materials and parts supplied by the plaintiff to the defendant at the request of the defendant, full particulars whereof the plaintiff had rendered to the defendant *vide* 4 invoices referred to in the statement of claim. The plaintiff relied on the defendant's letter dated 1 November 1985 signed by Datuk Syed Mahadzar bin Syed Hussein, the defendant's managing director, whereby the defendant confirmed settlement of the outstanding amount of RM251,002.60 and interest for RM16,181.51 calculated up to 16 October 1985 by monthly instalments of RM25,000 to be paid not later than 15 November 1985, to be followed by second instalment of RM15,000 in the month of December 1985 and subsequently monthly instalments of RM15,000 which would be reviewed when the financial position of the defendant improved. Consequent to this agreement the defendant paid the plaintiff the said sum of RM25,000 by way of cheque no. 132363 drawn on the Oriental bank Kuala Lumpur dated 25 November 1985. However upon presentation of the said cheque it was dishonoured with the remark "Refer to drawer".

On 19 March 1986 the defendant through its solicitor filed the defence and counterclaim. In the defence, the defendant admitted issuing the said cheque to the plaintiff which was returned dishonoured, but denied that the said cheque had anything to do with the plaintiff's claim. Further, the defendant denied owing the plaintiff any sum or at all and put the plaintiff to strict proof of its claim as pleaded in the statement of claim.

Thus far, it is quite clear to me that the defendant has failed to raise any reasonable or triable defence other than a bare denial as seen from the defence. "The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". (*AG of Duchy Lancaster v. L.N. & Ry. Company* [1892] 3 Ch 274). Insofar as the claim of the plaintiff against the defendant is concerned, I am satisfied that the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as pleaded as well as deposed in the affidavits are sufficient to settle the issue. Here, I am mindful of the principle that so long as the defence raised some questions fit to be decided by a Judge, the mere fact that the case is weak, and not likely to

succeed, is no ground for striking out the defence. Again, like O. 14 proceedings it is trite law that it is not permissible to try the action on affidavits when the facts and issues are in dispute (*Wenlock v. Moloney* [1965] 1 WLR 1238). However, upon considering the pleadings and the defence as a whole, I am satisfied, having regard to my discretionary jurisdiction, the defendant has failed to show or raised a reasonable or *bona fide* defence. Accordingly, the plaintiff's application to strike out the defence as it discloses no reasonable defence, frivolous and vexatious is allowed and I enter final judgment as prayed in para. 7 of the statement of claim.

In addition to the defence, the defendant has also counterclaimed against the plaintiff for breach of contract pursuant to an oral agreement to carry out repair work and to supply materials for the defendant's tug and barage known as "Kota Kayang I" and "Kota Kayang II". It is alleged that the plaintiff carried out the said work inefficiently and without proper skill and care and the materials supplied were bad and unsuitable. There was also a delay on the plaintiff's part in completing the repairs. Hence, in consequence of the aforesaid, the defendant claimed that it has suffered loss and damages, particulars thereof are supplied in the pleadings, where special damage has been quantified as RM117,000 and an unspecified general damages. This amount is undoubtedly less than the plaintiff's claim.

Mr. Vamathevan, a director of the plaintiff company deposed in his affidavit dated 15 April 1986 that at no time at all before the delivery of the defence and counterclaim or thereafter the defendant had raised the issues now pleaded in the counterclaim. He pointed out that the writ and the statement of claim was filed on 8 January 1986 and the defendant took about 70 days before it filed the defence and counterclaim on 19 March 1986. He contended that the counterclaim was not only a sham but was intended to delay and defeat the plaintiff's just claim.

The issue here is whether or not the defendant has set up a plausible counterclaim arising out of the same subject-matter of the plaintiff's action. "The right to bring a counterclaim is not a right of course, but depends on the discretion of the Judge." (*Anglo-Italian Bank v. Wells and Davies* [1878] 38 LT 197).

After considering the counterclaim, in my judgment, the defendant has set up what is called a plausible counterclaim which is connected with the plaintiff's claim. In *Sheppards and Co. v. Wilkinson and Jarvis* [1889] 6 TLR 13 the plaintiffs who were brokers of the stock exchange brought an action against the defendants to recover a sum of £7,500 advanced to them by the plaintiffs in March 1889. The defendants set up certain agreements which they alleged had been entered into between themselves and the plaintiffs and in accordance with which the sum of £7,500 had been advanced. They counterclaimed for the breach of these agreements and alleged that they had been obtained by fraud. The Master granted unconditional leave to defend (under O. 14), but Lord Justice Bowen, at Chambers, thought that there should only be leave to defend on condition of the defendants paying the £7,500 into account, which was affirmed by the Divisional Court. On appeal to the Court of Appeal, Lord Esher M.R., delivering the judgment stated as follows:

> A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counter-claim pure and simple. To shut out such a counter-claim if there was any substance in it would be an autocratic and violent use of O. XIV. The Court had no power to try such a counter-claim on such an application, **but if, they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to**

trial, it ought not to be excluded. If the counter-claim was for a less sum than that claimed, then judgment might be signed if there was no real defence for so much of the amount of the claim as was not covered by the counter-claim; ...

If it was clear that the claim must succeed, and there was really no defence to it, and the plaintiff would only be put to expense in proving his claim, then there ought to be judgment on the claim, but the matter must be so dealt with that defendants who had a plausible counter-claim must not be injured. That could be done by staying execution on the judgment until the counter-claim had been tried.

In the present case, the plaintiff is entitled to judgment for the sum of RM251,002.60 with interest and costs. But, on the other hand, the defendant has a plausible counterclaim which at this stage it will be wrong, indeed foolish, on my part to express any opinion that it should succeed. However, the amount counterclaimed, which is RM117,000, is less than the plaintiff's claim. In the circumstances of the case, I make an order that the plaintiff is entitled to judgment for the difference i.e., RM134,002.60 with interest and the execution of the balance of judgment sum be stayed until the trial of the counterclaim.

Also found at [1986] 2 CLJ 457